FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 32-CA-287631	Date Filed 12-13-2021

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Tesla

b. Tel. No.
(510) 249-3500

c. Cell No.

f. Fax No.

g. e-Mail

h. Number of workers employed
10000

d. Address *(Street, city, state, and ZIP code)*
45500 Fremont Blvd
CA Fremont 94538

e. Employer Representative

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Auto & Truck Manufacturers

j. Identify principal product or service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 1 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

--See additional page--

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
(b) (6), (b) (7)(C) Title:

4a. Address *(Street and number, city, state, and ZIP code)*
(b) (6), (b) (7)(C)

4b. Tel. No.
(b) (6), (b) (7)(C)

4c. Cell No.

4d. Fax No.

4e. e-Mail
(b) (6), (b) (7)(C)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.
(b) (6), (b) (7)(C)

By _____ Title: (b) (6), (b) (7)(C)
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address (b) (6), (b) (7)(C) 12/14/2021 10:01:01 AM
(date)

Tel. No.
(b) (6), (b) (7)(C)

Office, if any, Cell No.

Fax No.

e-Mail
(b) (6), (b) (7)(C)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Basis of the Charge

8(a)(1)

Within the previous six months, the Employer discharged an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee discharged	Approximate date of discharge
(b) (6), (b) (7)(C)	[redacted]/2021

8(a)(1)

Within the previous six months, the Employer disciplined or retaliated against an employee(s) because the employee(s) engaged in protected concerted activities by, inter alia, protesting terms and conditions of employment and in order to discourage employees from engaging in protected concerted activities.

Name of employee disciplined/retaliated against	Type of discipline/retaliation	Approximate date of discipline/retaliation
(b) (6), (b) (7)(C)	Termination	[redacted]/2021

February 8, 2022

VIA NLRB E-FILING & ELECTRONIC MAIL

Lelia Gomez
Field Attorney
National Labor Relations Board, Region 32
1301 Clay St. Ste 300N
Oakland, CA 94612

Re: Tesla, Case No. 32-CA-287631

Dear Ms. Gomez:

Tesla, Inc. ("Tesla" or the "Company") provides this position statement[1] in response to the above-referenced charge filed by (b) (6), (b) (7)(C) and your letter dated January 25, 2022. The charge alleges Tesla violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by discharging (b) (6), (b) (7)(C) for raising workplace safety issues to (b) (6), (b) (7)(C).

The charge lacks merit and should be dismissed, absent withdrawal. (b) (6), (b) (7)(C) was terminated because (b) (6) harassed and threatened a coworker by sending (b) (6), (b) text messages – including one that said "Fuck you sarcastic (b) (6) – in order to intimidate (b) (6), (into taking down a picture (b) (6), (had posted as part of (b) (6), job duties. (b) (6), (b) (7)(C) conduct violated Tesla's longstanding policies, which prohibit harassment, bullying, and intimidation, and expressly forbid the use of derogatory names, slurs, and epithets, including this term. Tesla has terminated other employees for using similar language to refer to coworkers.

(b) (6), (b) (7)(C) termination had nothing to do with any protected concerted activity. Even assuming the safety complaints (b) (6), (b) (7)(C) made to (b) (6), (b) (7)(C) could be considered "concerted," the evidence does not establish a *prima facie* case under *Wright Line*. First, (b) (6), (b) (7)(C) was not involved in the decision to terminate (b) (6), (b) (7)(C) and the individuals who did participate in the decision lacked sufficient knowledge of (b) (6), (b) (7)(C) complaints to (b) (6), (b) (7)(C) Second, there is no evidence Tesla harbored any animus toward (b) (6), (b) (7)(C) complaints to (b) (6), (b) (7)(C) The fact that (b) (6), (b) (7)(C) was terminated sometime after making these complaints does not, by itself, establish the complaints were a factor in (b) (6), (termination. And, were (b) (6), (b) (7)(C) to make out a *prima facie* case, the charge fails because the grounds for (b) (6) termination are legitimate and entirely unrelated to any protected concerted activity.

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[1] The Company submits this position statement solely for the Board's use and requests that the Board preserve the confidentiality of the statement. To that end, the Company further requests that the Board not reveal any of this position statement's contents to any other person without the Company's prior written consent, subject of course to requests under the Freedom of Information Act. In addition, the Company reserves the right to supplement or amend this position statement, including its attachments, as necessary.

For these reasons, and as discussed below, the Region should dismiss (b) (6), (b) (7)(C) charge, absent withdrawal.

I. FACTUAL BACKGROUND

A. Tesla's Operations and Relevant Policies.

Tesla is an electric vehicle and clean energy company whose mission is accelerating the world's transition to sustainable energy. (b) (6), (b) (7)(C) worked at Tesla's factory in Fremont, California, which is one of the Company's vehicle production facilities.

Tesla has a robust safety and health management system, dedicated to the concepts of continuous improvement in employee safety and health. Tesla cares deeply about the safety of its employees, and follows the adage "see something, say something" when it comes to safety and strives to give every employee an opportunity to voice any concerns that they may have. Tesla feels strongly about engaging employees in safety and health and encourages employee feedback. In fact, Tesla encourages and rewards employees who speak up when they see a safety risk – and asks them to be a part of the solution so that any safety issues can be quickly corrected. Tesla emphasizes listening to people "on the line" in order to get the most reliable information about where and how to improve safety measures.

To that end, the Environmental Health and Safety ("EHS") department at the Fremont factory has established expansive protocols to both monitor production processes to ensure Tesla employees and equipment are operating safely, as well as to provide numerous avenues for employees to report safety concerns. Employees can report safety concerns through the Take Charge Program, which is designed to empower all Tesla employees to assist in building a strong safety culture by submitting improvement ideas. Safety, security and improvement suggestions can be submitted through a submission form which will be sent to the EHS department.

EHS also operates safety committees for each shift, made up of associates, leads, and EHS representatives. The safety committees meet regularly to discuss safety issues, and safety committee representatives can raise safety concerns at these meetings. In addition to the more formal channels for raising safety concerns, Tesla's "Open Floor" policy supports a culture where employees can talk to their EHS representatives, supervisors and managers about issues and have them addressed as needed.

Tesla is also committed to a working environment and culture that is safe, respectful, fair, and inclusive for all its employees. In recent years, Tesla has taken even more measures to meet this commitment, including adding an Employee Relations team that is dedicated to investigating employee complaints, and adopting a comprehensive Employee Guidebook

that describes all of the Company's HR policies, employee protections, and ways to report issues.

The Guidebook sets forth Tesla's Policy Against Discrimination, which describes Tesla's commitment to equal opportunity, diversity, equity and inclusion, and states that discrimination, harassment, and bullying are "absolutely not tolerated" in any form. Exh. A. Tesla's policy prohibiting harassment ("Anti-Harassment policy") specifically forbids, among other things, harassment based on verbal conduct or text messages, including "taunting, jokes, threats, epithets, derogatory comments or slurs." *Id.* In addition, the policy prohibiting bullying ("Anti-Bullying policy") specifically prohibits "abusive conduct, bullying or other intimidating or aggressive behavior among employees." *Id.*

The Guidebook also sets forth the procedures for reporting and investigating complaints of violations of these policies. Any employee who is subjected to, a witness of, or has knowledge of, any conduct that constitutes a violation is expected to immediately report the conduct to their manager, HR Partner, or anonymously through a dedicated Integrity Line. *Id.* Tesla's HR and ER teams ensure that complaints are investigated in an impartial manner. *Id.* After an investigation has been conducted, the investigator(s) makes an objective assessment of whether there has been a violation of any policy. If Tesla determines that conduct or statements violating its policies have occurred, it will take appropriate disciplinary action up to and including termination from employment. *Id.*

Employees are aware of these policies and that they are expected to strictly follow them. Employees, including (b) (6), (b) (7)(C) were required to sign acknowledgments confirming they had received the Guidebook. Exh. B. Additionally, in July 2021, Tesla's (b) (6), (b) (7)(C) at the time, (b) (6), (b) (7)(C) , issued a note to employees reminding them that Tesla "expressly forbids all … slurs, epithets or derogatory expressions based on any characteristics a person may have," and encouraging employees to reread "Our Commitment to Equal Employment Opportunity, Diversity, Equity & Inclusion" in the Guidebook (which is part of the Policy Against Discrimination). Exh. C (*available at* https://www.tesla.com/blog/back-office-excellence-respect). The note discussed specific examples of prohibited exclusionary language, including the "B-word", and reminded employees that, per Tesla's longstanding policies, it "will take immediate disciplinary action if we find that any employees has used these words towards anyone at our work locations." *Id.*

B. (b) (6), (b) (7)(C) Employment With Tesla.

Prior to (b)(6), termination in (b) (6), (b) (7)(C) 2021, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) . (b) (6), (b) (7)(C) was , and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) .

From the time (b) (6), (b) (7)(C) became (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) often would talk to (b) (6), (b) (7)(C) about issues or concerns. Consistent with Tesla's "Open Floor" policy, (b) (6), (b) (7)(C) encouraged (b) (6), team to bring their concerns about any workplace issues to them so (b) (6) can get them addressed, and regularly affirmatively asked employees if they have any concerns to encourage them to do so.

One concern (b) (6), (b) (7)(C) raised to (b) (6), (b) (7)(C) involved the installation of a pedestal grinder tool, which (b) (6), (b) (7)(C) believed was unsafe. (b) (6), (b) (7)(C) raised this issue to (b) (6), (b) (7)(C) around (b) (6), (b) (7)(C) 2021. In response to (b) (6), (b) (7)(C) complaint, (b) (6), (b) (7)(C) investigated and ensured the tool was reinstalled and re-anchored.

Another concern (b) (6), (b) (7)(C) raised involved metal plates that had fallen on the shop floor. Typically, if an employee working on the shop floor comes across a fallen plate as they are working throughout the day, they will pick it up and move it out of the way. Employees are also supposed to move any fallen plates when they clean and organize the floor at the end of a shift, although sometimes some employees may fail to complete this task. (b) (6), (b) (7)(C) complained about plates being on the floor on multiple occasions. Sometimes when (b) (6), (b) (7)(C) went to investigate the issue, the plate had already been picked up and moved out of the way by another employee. When plates were not picked up at the end of a shift, (b) (6), (b) (7)(C) would remind employees that they needed to organize and clean their working areas.

As to the scrap bins, (b) (6), (b) (7)(C) complained to (b) (6), (b) (7)(C) about the bins not being emptied frequently enough.[2] (b) (6), (b) (7)(C) explained to (b) (6), (b) (7)(C) that the bins were supposed to be filled up before they were emptied, so they did not always need to be emptied when (b) (6), (b) (7)(C) thought they did. If (b) (6), (b) (7)(C) complained and (b) (6), (b) (7)(C) noticed a bin was overly full, (b) (6), (b) (7)(C) would remind the department whose responsibility it was to empty the bins. (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) communicated about these issues verbally. At no point, to Tesla's knowledge, did (b) (6), (b) (7)(C) take the position (b) (6), was speaking on behalf of other employees, or otherwise attempt to initiate "group" action by employees. Instead, these interactions were run-of-the-mill individual discussions between an employee and (b) (6), supervisor about routine operational or safety issues.

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[2] The Region's request for evidence letter refers to a complaint about "the unsafe loading of scrap bins," but the only complaint (b) (6), (b) (7)(C) raised relating to scrap bins the Company is aware of relates to their emptying.

C. Tesla Investigates (b) (6), (b) (7)(C) Hostile Work Environment Complaint Against (b) (6), (b) (7)(C)

On (b) (6), (b) (7)(C), 2021,[3] (b) (6), (b) (7)(C) sent an email to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) complaining about text messages sent to (b) (6), (b) by (b) (6), (b) (7)(C) in which (b) (6) stated **"Fuck you sarcastic** (b) (6), (b) (7)(C)

Exh. D (emails and attachments). (b) (6), (b) (7)(C) then forwarded the email to (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), who opened an investigation.

The text messages involved a photograph (b) (6), (b) (7)(C) had taken of the shop at the end of a shift and posted as part of Tesla's "Passdown" process for shift transitions. Exhs. E and F ((b) (6), (b) (7)(C) email from (b) (6), (b) (7)(C)). As (b) (6), (b) (7)(C), one of (b) (6), (b) (7)(C)s responsibilities was to take a picture of the work area after each shift and post it in Passdown. The photo provides verification to management that the shop area is clean and in good order, and that end-of-shift job responsibilities have been completed. The particular photo at issue showed another associate sitting down, with only their legs and part of their torso visible. Exh. E.

It is not uncommon for these pictures to sometimes include other associates who are on the shop area at the time, working or not working. However, (b) (6), (b) (7)(C) – who was (b) (6), (b) (6), (b) (7)(C) shown sitting in this particular photo – apparently believed (b) (6), (b) (7)(C) posted the photo to disrespect (b) (6), (b) and show (b) (6), (b) in an unfavorable position. *See* Exh. G. Later

[3] All dates hereinafter refer to 2021 unless otherwise stated.

that day, [redacted] sent [redacted] a text stating "You took a picture of me sitting and posted in passdown. You suck." Exh. D. [redacted] then texted a photo of [redacted] sitting at a desk with [redacted] head down and said "Fuck you, sarcastic [redacted] Take that picture off or I'll post this one." *Id.*

[redacted] interviewed [redacted] and [redacted] in connection with the investigation on [redacted] and [redacted], respectively. Exhs. G and H. [redacted] admitted to sending the texts. [redacted] stated [redacted] felt disrespected and felt that [redacted] was harassing [redacted] and [redacted] behavior crossed the line.

Based on the text message proof, as well as [redacted] admission, Tesla decided to terminate [redacted] for calling [redacted] a derogatory name and engaging in intimidation related to [redacted] work duties, in violation of the Anti-Harassment policy and Tesla's general "zero tolerance" approach for violations given its proactive efforts to promote a respectful and discrimination-free workplace. Exh. F (Nov. 3 email from [redacted] On [redacted] decided [redacted] should be terminated, and sent their determination to [redacted] for review. *Id.* Prior to [redacted] 2021, [redacted] reviewed terminations; however, in this case the review was delayed because [redacted] departed from Tesla in [redacted] 2021. After [redacted] departure, [redacted] managers and HR nonetheless moved forward with their decision to terminate [redacted] On [redacted] verbally informed [redacted] the Company had completed its investigation of [redacted] complaint and determined that it was substantiated, and based on that violation Tesla would separate [redacted]

[redacted] was not consulted during the harassment investigation in [redacted], nor did [redacted] participate in the decision to terminate [redacted] In [redacted], once the decision to terminate [redacted] had been made and was being finalized, [redacted] informed [redacted] of the investigation and termination decision.

On [redacted] after [redacted] was terminated, [redacted] sent an email to HR claiming [redacted] was wrongfully terminated and stating [redacted] had previously called [redacted] offensive names. Exh. I.[4] Notably, [redacted] email did not refer to "safety

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4 [redacted] had previously raised a similar claim when [redacted] was interviewed on [redacted] regarding [redacted] complaint. *See* Exh. G; Exh. F [redacted] email from [redacted]). In response, [redacted] told [redacted] [redacted] should report [redacted] comments, and asked [redacted] if [redacted] could provide the names of any witnesses to substantiate the allegations, but [redacted] declined to do so at that time. Nonetheless, Tesla opened an investigation into [redacted] claim, interviewing [redacted], as well as the [redacted] witnesses whose names [redacted] provided for the first time during the [redacted] conversation where [redacted] was

complaints" or another other potential protected, concerted activity as having any connection to [redacted] discharge (because there were none).

II. DISCUSSION

A. Tesla Terminated [redacted] For Violating Tesla's Anti-Harassment Policy – Not For Any Alleged Protected Concerted Activity.

1. [redacted] Cannot Establish a *Prima Facie* Case Under *Wright Line.*

To establish a termination was discriminatorily motivated in violation of Section 8(a)(1), there must be a causal connection between the employee's protected concerted activities and the termination. *See Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6 (2019); *P.W. Supermarkets*, 269 NLRB 839, 840 (1984). This requires, at a minimum, evidence of protected concerted activity, knowledge of that activity by the employer, and employer animus or hostility toward that activity. *See Tschiggfrie Properties, Ltd.*, above, slip op. at 7; *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Additionally, a Section 8(a)(1) discrimination violation requires evidence of a "nexus" between the employee's alleged protected activity and termination. *Tschiggfrie*, above, slip op. at 7.[5]

Here, the evidence does not establish [redacted] safety complaints to [redacted] were concerted, that the relevant decisionmakers had knowledge of them, or that Tesla possessed animus toward [redacted] safety complaints – or toward employee safety complaints generally. As a result, the evidence does not establish [redacted] safety complaints were a "substantial or motivating factor" in the decision to terminate [redacted] (*NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394 (1983)), and the charge should be dismissed.

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informed of [redacted] termination and in [redacted] email to HR later that day. That investigation is still ongoing because [redacted] has been [redacted] since [redacted]

[5] Under current Board law, a Section 8(a)(1) discrimination violation requires evidence of a "nexus" between the employee's alleged protected activity and termination. *Tschiggfrie*, above, slip op. at 7. However, even under a legal standard that does not include a separate "nexus" element, this is not a close case because, as discussed below, there is no evidence that Tesla harbored animus toward employee safety complaints generally, or that safety complaints played any role in [redacted] termination.

a. There Is No Evidence (b) (6), (b) (7)(C) Engaged in Protected Concerted Activity with Respect to (b) (6) Safety Complaints or Otherwise.

(b) (6), (b) (7)(C) alleges (b) (6), (b) (7)(C) was terminated because of (b) (6), (b) (7)(C) complaints, made at some point in 2020 or 2021, over the installation of a pedestal grinder, the loading of scrap bins, and fallen large metal plates on the shop floor. As an initial matter, the evidence does not support a finding these complaints were concerted activity. There is no evidence (b) (6), (b) (7)(C) made these complaints with other employees, or that (b) (6), (b) (7)(C) acted on behalf of any other employees. *See, e.g.*, *Meyers Industries*, 281 NLRB 882, 885 (1986) ("*Meyers II*") (to find an activity "concerted" the Board will "require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (2019) (an individual complaint does not qualify as concerted activity "solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun"); *see also Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria*, 368 NLRB No. 45, slip op. at 1 fn. 3, 6 (2019) (to qualify as PCA, the employee "must be actually, rather than impliedly, representing the views of other employees") (citations omitted); *7 Gates Mediterranean Grill*, Case 13-CA-255603, NLRB Advice Memorandum (June 30, 2020) (the Board has never held that discussions of health and safety issues are "inherently concerted").

Nonetheless, even if the Region were to find (b) (6), (b) (7)(C) complaints were concerted under current NLRB precedent, or under a not-as-yet adopted "inherently concerted" theory, the evidence fails to establish knowledge, animus, or a nexus between (b) (6), (b) (7)(C) complaints and the Company's decision to terminate (b) (6), (b) (7)(C)

b. (b) (6), (b) (7)(C) Was Not Involved in the Decision to Terminate (b) (6), (b) (7)(C) and the Individuals Who Participated in the Decision Lacked Knowledge of (b) (6), (b) (7)(C) Alleged Protected Concerted Activity.

(b) (6), (b) (7)(C) was not involved in the investigation of (b) (6), (b) (7)(C) hostile work environment complaint (apart from being copied on (b) (6), (b) (7)(C) initial email to (b) (6), (b) (7)(C) nor was (b) (6), (b) (7)(C) consulted in the decision to terminate (b) (6), (b) (7)(C) *See* Exh. F (email from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C) stating the decisionmakers were (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) It was not until after the decision to terminate (b) (6), (b) (7)(C) had been made and was being finalized that (b) (6), (b) (7)(C) was informed of the investigation and termination decision.

Moreover, (b) (6), (b) (7)(C) does not allege – nor is Tesla aware of any evidence that would establish – that any of the (b) (6), (b) (7)(C) individuals who participated in the termination decision (b) (6), (b) (7)(C) had knowledge of (b) (6), (b) (7)(C) safety-related complaints to (b) (6), (b) (7)(C) It is possible (b) (6), (b) (7)(C) may try to allege that an email (b) (6), (b) (7)(C) sent to

(b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) put (b) (6), (b) (7)(C) (and/or (b) (6), (b) (7)(C) who were copied on the email) on notice of (b) (6), (b) (7)(C) safety complaints. *See* Exh. J. However, the email's single, vague reference to (b) (6), (b) (7)(C) having "pointed out safety hazards in the shop," among a sea of obviously personal gripes, is insufficient to establish the PCA knowledge element of (b) (6), (b) (7)(C) *prima facie* case. (b) (6), (b) (7)(C) email did not specifically discuss what the actual safety issues were, nor would anything in the email suggest to (b) (6), (b) (7)(C) or the other recipients that (b) (6), (b) (7)(C) had engaged in or was continuing to engage in concerted activity.

Rather, as mentioned, the email focused on (b) (6), (b) (7)(C) own personal gripes about (b) (6), (b) (7)(C) relationship with (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) most recent compensation increase – which (b) (6), (b) (7)(C) made clear was (b) (6), (b) (7)(C) "main issue" in the follow-up email (b) (6), (b) (7)(C) sent to (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C). *See* Exh. K. And when (b) (6), (b) (7)(C) met with (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) (after (b) (6), (b) (7)(C) had returned from leave), the only issue (b) (6), (b) (7)(C) was interested in discussing was own compensation increase, despite (b) (6), (b) (7)(C) offer in (b) (6), (b) (7)(C) response to discuss "any and all" of (b) (6), (b) (7)(C) concerns. *See* Exh. J. These personal complaints, which were not on behalf of other employees or purporting to represent their concerns, were not protected concerted activity. *See Holling Press Inc.*, 343 NLRB 301, 302 (2004) (finding an employee's complaints were "individual in nature" and "were not made to accomplish a collective goal" but to "advance her own cause"); *Tampa Tribune*, 346 NLRB 369, 371-72 (2006) (holding employee's complaints about manager's favoritism not considered "concerted" because employee was speaking "only for himself.").

Given the decisionmakers' lack of knowledge of protected concerted activity – and the lack of involvement by (b) (6), (b) (7)(C) in the harassment investigation or discharge decision – (b) (6), (b) (7)(C) cannot establish a *prima facie* case of discrimination. *See M & G Convoy, Inc.*, 287 NLRB 1140, 1144 (1988) (finding no causal relationship between employee's protected activities and warnings where no supervisor or manager with knowledge of the employee's protected activity influenced or played a role in the decision to issue the warnings).

c. Tesla Did Not Bear Any Animus Toward (b) (6), (b) (7)(C) for Protected Concerted Activities.

(b) (6), (b) (7)(C) also cannot establish a *prima facie* case under *Wright Line* because there is no evidence the Company harbored any animus toward (b) (6), (b) (7)(C) in connection with (b) (6), (b) (7)(C) safety complaints or any other *potential* PCA. *See In re Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001) ("[E]ven where knowledge has been established, the failure to make a credited showing of animus will likewise warrant dismissal of the complaint.").

(b) (6), (b) (7)(C) offers no evidence of animus toward PCA, other than the deficient claim that (b) (6), (b) (7)(C) did not like (b) (6), (b) (7)(C) or treated (b) (6), (b) (7)(C) unfairly. There is no factual support for (b) (6), (b) (7)(C) allegation in the (b) (6), (b) (7)(C) email that (b) (6), (b) (7)(C) had a "personal vendetta"

against [redacted] whether due to safety complaints or other reasons. *See* Exh. J. [redacted] did not harbor any animus towards employees, [redacted] included, for raising workplace operational or safety issues. [redacted] timely addressed them on numerous occasions.[6]

Even had [redacted] shown animus toward [redacted] none of that purported animus impacted the harassment investigation or discharge decision. As an initial matter, the investigation that led to [redacted] termination was initiated by a complaint submitted by a coworker, not [redacted], or any other supervisor or manager. Further, there is no evidence any of the individuals actually involved in the investigation and decision harbored any animus toward [redacted] safety complaints to [redacted] (to the extent they were even aware of them, as discussed above). In fact, when [redacted] received [redacted] email, [redacted] *favorably responded* to [redacted] by stating [redacted] would "be more than happy" to talk about [redacted] concerns, and eventually did meet with [redacted] after [redacted] returned from leave in [redacted]. The evidence thus shows [redacted] was *encouraged to raise concerns*, not retaliated against for raising them.

Further, [redacted] has not – and cannot – establish that [redacted] was treated differently from other similarly situated employees because, as discussed below, Tesla has terminated other employees based on substantiated incidents involving derogatory language.[7] *See St. Clair Memorial Hospital*, 309 NLRB 738, 743 (1992) (General Counsel failed to prove disparate treatment where employer treated like employees alike).

Accordingly, in the absence of any evidence of animus towards the alleged protected concerted activity, there is no *prima facie* case. *See In re St. Vincent Med. Ctr.*, 338 NLRB 888, 895 (2003) (finding that the General Counsel had failed to demonstrate animus on the part of the employer and therefore had failed to establish a prima facie case); *Joshua Assocs.*, 285 NLRB 397, 399 (1987) (General Counsel failed to establish a prima facie case "[i]n view of the virtual absence of credible evidence of union animus").

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6 [redacted] also alleges to the Region that [redacted] falsely accused [redacted] of breaking a hammer and made discriminatory comments regarding [redacted] nationality. These allegations have nothing to do with any protected concerted activity, and are irrelevant to the question of whether [redacted] or anyone at Tesla harbored any animus toward [redacted] safety complaints – which they did not.

7 To the extent [redacted] may claim disparate treatment based on Tesla's treatment of [redacted] who also used derogatory language toward [redacted] that investigation is ongoing, and therefore not comparable to Tesla's treatment of [redacted] who admitted to making the statements at issue, which were also substantiated with text message proof.

d. The Evidence Fails to Establish A Nexus Between [redacted] Alleged Protected Activity and [redacted] Termination.

[redacted] allegation that [redacted] was terminated "following" making safety complaints to [redacted] fails to demonstrate any objective nexus between alleged protected concerted activity and [redacted] termination.[8] The fact that [redacted] independently initiated a hostile work environment complaint in [redacted] against [redacted] undermines any inference of unlawful motivation with the investigation or discharge decision timing. Any suggestion [redacted] complaints to [redacted] and [redacted] termination were related would be speculative at best, and is contradicted by other evidence. *See, e.g., U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 2 (2019) (finding timing of wage increases alone was insufficient to show they were announced and implemented to discourage union activity); *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999) ("The record in this case shows nothing more than the timing of [the employee's] discharge shortly after the representation election was a coincidence. Such a coincidence, at best, raises a suspicion. However, 'mere suspicion cannot substitute for proof' of unlawful motivation."); *Cardinal Home Prods.*, 338 NLRB 1004, 1009 (2003) (mere suspicion, surmise, and conjecture, however, are insufficient to form the basis for a violation). The Company was not required to refrain from investigating or taking action on a substantiated violation of its Anti-Harassment policy merely because [redacted] had also at some point in 2020 or [redacted] in 2021 "complained" about safety or operational issues.

B. Tesla Terminated [redacted] Consistent With Its Longstanding Policies.

Even if [redacted] could establish a *prima facie* case – which [redacted] cannot – Tesla can rebut the allegation by establishing that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). Tesla's demonstration that the termination would have "taken place even in the absence of protected conduct" provides a complete defense to an alleged

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[8] As noted above, even if the Region were to apply a legal standard that does not require [redacted] to independently establish a "nexus" between [redacted] safety complaints and termination, the absence of knowledge on the part of the [redacted] decisionmakers – [redacted] as well as the absence of evidence of animus toward [redacted] safety complaints, or toward employees making safety complaints generally, warrants dismissal of this charge. The fact that [redacted] was terminated for sending harassing texts to a coworker at some point after [redacted] made safety complaints to [redacted] supervisor, by itself, is insufficient to establish either the knowledge or animus elements of [redacted] *prima facie* case.

violation of Sections 8(a)(1). *Wright Line*, 251 NLRB at 1089; *see also Cardinal Home Prods., Inc.*, 338 NLRB 1004, 1008 (2003) (stating employer may defend a charge "[by] asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation").

Here, Tesla's longstanding policies expressly prohibit harassment, bullying, and discrimination, including "threats, epithets, derogatory comments or slurs," and any employee found to have engaged in such conduct may be subject to discipline, up to and including termination. Exh. A; Exh. C. Tesla has taken a strong stance toward derogatory language, and reminded employees of its policies expressly forbidding the use of derogatory language in [redacted] 2021, specifically identifying the word "[redacted]" – the same word [redacted] used here – as a term that employees are prohibiting from calling one another.

There is no question that [redacted] called [redacted] this name – which is corroborated by the text messages [redacted] provided and [redacted] own admission – or that [redacted] conduct violated Tesla's policies. Tesla did not violate the Act by terminating [redacted] consistent with its lawfully-maintained policy. *See In re Far W. Fibers, Inc.*, 331 NLRB 950, 950 (2000) (finding no violation of the Act because employer's suspension of employee, even if motivated by employee's union activity, was consistent with employer's disciplinary policy and thus employer showed that it would have issued such discipline even in the absence of employee's union activity).

Further, Tesla has terminated other employees for similar reasons. *See* Exh. L[9] (termination involving employee who called coworker and supervisor a "[redacted]" Exh. M (termination involving employee who called [redacted] supervisor a [redacted] a*s [redacted] and made threats); Exh. N[10] (termination involving employee who engaged in a verbal altercation with coworker where the employees called one another a [redacted][11]); *id.* (termination involving employee who sent texts to coworker calling [redacted] a [redacted] claiming [redacted] will "knock [the employee] and [redacted] off," and saying in a threatening manner "see ya at Tesla").

These examples show Tesla's decision to terminate [redacted] was consistent with its treatment of other substantiated incidents where an employees has engaged in harassment

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9 Employee names and other identifying information have been redacted from Exhibits L through M to protect privacy.

10 Exhibit S consists of select termination case summaries that have been copied and pasted from Tesla's internal records.

11 This case summary also discusses two other employee terminations, one of which was the other employee involved in the altercation, who also engaged in other misconduct.

and intimidation by calling a coworker a derogatory name. This evidence reaffirms that the Company terminated (b) (6), (b) (7)(C) for a legitimate, non-discriminatory reason. *St. Clair Memorial Hospital*, 309 NLRB 738, 743 (1992) (noting the General Counsel's failure to prove disparate treatment in finding that employer met the *Wright Line* burden upon proof that the employer treated similar employees alike); *West Irving Die Casting of Kentucky, Inc.*, 346 NLRB 349, 349-350 (2006) (finding termination for attendance policy violation was not unlawful where the employer "implemented the precise, published terms of its policy in a consistent manner"). Therefore, the charge should be dismissed for this reason as well.

III. CONCLUSION

The Company respectfully requests that the Region dismiss the charge as without merit, absent withdrawal.

Please let us know if you have any questions or need any additional information to complete the Region's investigation.

Sincerely,

David R. Broderdorf

DRB

cc: Lauren M. Emery

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

February 18, 2022

(b) (6), (b) (7)(C)

Re: Tesla, Inc.
Case 32-CA-287631

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Tesla (Employer) has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge for the reasons discussed below. Your charge, as elaborated upon during the investigation, alleges that the Employer terminated you because you engaged in protected, concerted activities by conveying safety-related complaints to (b) (6), (b) (7)(C). While you did engage in protected concerted activities, the evidence was insufficient to establish that animosity towards your protected concerted activity was a motivating factor (in whole or in part) for the Employer's decision to terminate you. *See Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Further, even assuming that your protected activity was a motivating factor in the termination decision, the Employer has demonstrated that it would have taken the same action even in the absence of the protected activity based on alleged misconduct that was wholly unrelated to your protected concerted activities. Accordingly, I am terminating your charge in its entirety.

Charging Party's Right to Appeal: The Charging Party may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Means of Filing: You must file your appeal electronically or provide a written statement explaining why electronic submission is not possible or feasible. Written instructions for the NLRB's E-Filing system and the Terms and Conditions of the NLRB's E-Filing policy are available at www.nlrb.gov. See User Guide. A video demonstration which provides step-by-step instructions and frequently asked questions are also available at www.nlrb.gov. If you require additional assistance with E-Filing, please contact e-Filing@nlrb.gov.

You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. If you cannot file electronically, please send the appeal and your written explanation of why you cannot file electronically to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **March 4, 2022**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than March 3, 2022. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before March 4, 2022.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after March 4, 2022, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor requests to limit our use of appeal statements or evidence. Upon a request under the Freedom of Information Act (FOIA) by a party during the processing of an appeal, the Agency's FOIA Branch discloses appeal statements, redacted for personal privacy, confidential source protection, or other applicable FOIA exemptions. In the event the appeal is sustained, any statement or material submitted may be introduced as evidence at a hearing before an administrative law judge. However, certain evidence produced at a hearing may be protected from public disclosure by demonstrated claims of confidentiality.

Very truly yours,

Christy J. Kwon
Acting Regional Director

Enclosure

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(b) (6), (b) (7)(C)
TESLA, INC.
45500 FREMONT BLVD.
FREMONT, CA 94538

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

E-FILING TO APPEALS

1. **Extension of Time**: This document is used when the Charging Party is asking for more time to efile an Appeal.

    - If an Extension of Time is e-filed, and there are additional documents to be e-filed simultaneously with it, please e-file those documents under the selection **Correspondence**.
    - After an Extension of Time has already been e-filed, any **additional** materials to add to the Extension of Time should be e-filed under **Correspondence**.

2. **File an Appeal**: If the Charging Party does not agree with the Region's decision on the case, an Appeal can be e-filed.

    - Only **one** (**1**) **Appeal** can be e-filed to each determination in the Region's decision letter that is received.
    - After an Appeal has been e-filed, any **additional** materials to add to the Appeal should be e-filed under **Correspondence**.

3. **Notice of Appearance**: Either party can e-file a Notice of Appearance if there is a new counsel representing one side or a different counsel.

    - This document is only e-filed with the Office of Appeals after a decision has been made by the Region.
    - This document can be e-filed **before** an Appeal is e-filed.

4. **Correspondence**: Parties will **select** Correspondence when adding documents or supplementing the Appeal or Extension of Time.

    - Correspondence is used to e-file documents **after** an **Extension of Time, Appeal** or **Notice of Appearance** has been e-filed.

5. **Position Statement**: The Charging Party or Charged Party may e-file a Position Statement.

    - The Charging Party will e-file this document as a supplement of the Appeal.
    - The Charged Party will specifically file one to support the Region's decision.
    - This document should be e-filed **after** an **Extension of Time, Appeal** or **Notice of Appearance** has been e-filed.

6. **Withdrawal Request**: If the Charging Party decides to no longer pursue their appeal, he/she can e-file a Withdrawal Request to the Office of Appeals.

    - This document should be e-Filed **after** an **Extension of Time, Appeal** or **Notice of Appearance** has been e-filed.

7. The selections of **Evidence** or **Other** should no longer be used.